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No. 88-252

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILLY H. HARTNESS and
BRENDA K. KEENER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

I. Whether the materiality of an alleged "false statement" under 18 U.S.C. § 1001 is an essential element of the offense and, if so, whether a binding instruction to the jury that the statement was material as a matter of law violates the right to trial by jury and the due process requirement of proof beyond a reasonable doubt as to each essential element of an offense?

II. Whether the application of the "false statement" requirement of 18 U.S.C. § 1001 to estimates or projections of future income provides fair notice to a citizen of what conduct on his part may give rise to punishment; and whether that application provides an objective and ascertainable standard of guilt to be applied by the jury, as required by the due process clause?

III. Whether the imposition of an alternative fine under 18 U.S.C. § 3623, without a factual determination by the jury that the offense was committed after the effective date of that statute, violates due process and the ex post facto principle embodied in the due process clause of the Fifth Amendment?

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Opinion Below

The opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at *United States* v. *Hartness*, 845 F.2d 158 (8th Cir. 1988), and is reproduced verbatim in Appendix A hereto, at 1a.

Jurisdiction

Petitioners request this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit filed April 15, 1988, affirming Petitioners' convictions for conspiracy to defraud the government (18 U.S.C. § 371 and § 1001), and false statement (18 U.S.C. § 1001). This Petition for Certiorari is being filed within sixty (60)

days of the date of the denial of the Petition for Rehearing En Banc, which was entered on June 13, 1988, as required by Rules 20.1 and 20.4 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., amend. V (Appendix B, 12a).

U.S. Const., amend. VI (Appendix B, 12a).

18 U.S.C. § 371 (Appendix B, 13a).

18 U.S.C. § 1001 (Appendix B, 12a).

18 U.S.C. § 3623 (Appendix B, 13a).

Statement of the Case

A. *Procedural History.*

Petitioners were tried on charges contained in a Superseding Indictment, returned on March 17, 1986, in the United States District Court for the Eastern District of Arkansas. The indictment charged each petitioner with conspiracy to defraud the government (18 U.S.C. § 371 and § 1001) and with numerous counts of substantive offenses of false statements (18 U.S.C. § 1001). The charges all related to the submission of documents in support of loan applications to the Farmers Home Administration, under the Rural Housing Program. Petitioner Hartness was a building contractor involved in the construction of single family dwellings in the Monticello, Arkansas area, and surrounding areas. Petitioner Keener was an employee of Petitioner Hartness, and also the owner of Keener Realty, a licensed real estate broker.

Petitioner Hartness was charged in a total of five counts; one count of conspiracy and four substantive counts of falsification of documents. At the close of the evidence, one of the substantive counts was dismissed on motion of the government. Of the four counts submitted to the jury, Petitioner Hartness was acquitted on two counts and convicted on two counts. Petitioner Keener was charged in a total of ten counts; one count of conspiracy and nine counts of falsification of documents. Of these charges, the jury returned verdicts of acquittal on seven counts and convicted Petitioner Keener on three counts. The verdicts were returned on April 1, 1987. Timely post-trial motions were denied, in a written Order entered by the district court on May 22, 1987.

After denying Petitioners' post-trial motions, the district court entered judgment on the verdicts, and sentenced Petitioners on June 8, 1987. Petitioner Hartness was sentenced to two (2) years imprisonment and assessed a fine of $50,000.00 on Count I (conspiracy). On Count VI, the district court suspended the imposition of sentence and placed Petitioner on three (3) years probation, consecutive to the sentence imposed on Count I.

Petitioner Keener was sentenced to two (2) years imprisonment and assessed a fine of $5,000.00 on Count I. On Count V and X, the district court suspended the imposition of sentence and placed Petitioner on three (3) years probation on each count. These sentences were to run concurrently, but consecutive to the sentence imposed under Count I.

Petitioners filed a timely Notice of Appeal on June 12, 1987, and prosecuted their appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the judgments of conviction and the sentences in all respects. *United States* v. *Hartness*, 845 F.2d 158

(8th Cir. 1988). Petitioners seek this Court's review, by certiorari, on three separate grounds, as set forth in this Petition.

B. *Factual History.*

1. The "False Statements" Counts.

The Petitioners were charged with conspiracy to defraud the Government, and with making (or causing to be made) material false statements in applications and a verification of employment forms which were submitted to Farmers Home Administration (FmHA). Both petitioners were charged in Count I with conspiracy to defraud the government by submitting (or causing to be submitted) materially false and fraudulent statements to the FmHA. Petitioner Keener was charged in Count V with representing that the "annual income" of Michael R. Grubb was $7,176.00, when she then knew that the annual income was less than that amount. Likewise, Petitioner Hartness was charged in Count VI (along with Petitioner Keener) with representing that Michael R. Grubb "was earning" $10,000.00 per year, when he knew that Michael R. Grubb "earned" $7,370.00.

Michael R. Grubb was an hourly employee in Petitioner Hartness' building supply business, who desired to make application for a loan from FmHA under its Rural Housing Program. Grubb was named (along with his wife, Deedra Grubb) as an unindicted co-conspirator in the Indictment; but was not prosecuted, as a result of an agreement with prosecutors, involving cooperation and certain reimbursement to the government in connection with his loan.

Petitioner Keener was a co-employee of Michael Grubb, in Petitioner Hartness' business, and she assisted Grubb

in preparing his FmHA application. Petitioner Hartness subsequently completed a verification of employment (VOE) form in connection with Grubb's application. In its application forms, the FmHA seeks an estimate of an applicant's future earnings from the date of application through the following twelve (12) months.

The evidence presented at trial showed that the Petitioners not only included estimates of Grubb's "annual income," but also set forth the method used to compute the amounts of the estimates. On March 17, 1984 Petitioner Keener estimated that Grubb would earn $7,176.00 in the ensuing twelve months. Later, on August 21, 1984, Petitioner Hartness estimated that Grubb would earn "approximately $10,000.00" per year in the twelve months following that date. Michael Grubb's actual payroll records and W-2 Forms were also introduced in evidence at the trial. Grubb testified that he actually did earn approximately $7,870.00 during calendar year 1984. Grubb further testified that Hartness' August 21, 1984 estimate of "approximately $10,000" for the ensuing twelve months was "pretty close." (T. 502-503).

At the close of the evidence, the trial court instructed the jury that, although the alleged "statements" in this case must have been "material," the issue of materiality was not being submitted for the jury's consideration. The court expressly instructed the jury that the statements were material as a matter of law. Specific, contemporaneous objections to this treatment of the issue of materiality were made by Petitioners.

2. The Instruction on "False Statements".

In connection with the substantive "falsification of documents" charges in the Indictment, the trial court instructed the jury that three (3) elements were required to be proved: (1) use of a false writing or document; (2) knowl-

edge that the writing or document was false or fictitious and fraudulent in some material particular; and (3) willfulness. (T. 1129-1130) The trial court further instructed that a statement was "false" or "fictitious," if it was "untrue" when made, and known to be "untrue" by the person making it. (T. 1130) "Fraudulent" was likewise defined by use of the term "untrue." (*Id.*) The instruction did not distinguish between statements of fact and estimates or projections, when dealing with the issue of false statements. Throughout these proceedings, beginning with an attack on the sufficiency of the indictment, these Petitioners have contended that the application of § 1001 to estimates and projections violated due process.

3. The Enhanced Sentence.

Count I of the Superseding Indictment charged a conspiracy which was alleged to have existed from approximately January 5, 1983, up through the date of the Indictment, March 17, 1987. The trial court properly instructed the jury that the allegations in the indictment were not evidence, and were not to be considered as such by the jury. With respect to the conspiracy charge, the trial court further instructed the jury that the offense was complete upon the jury's finding that: (1) the existence of the conspiracy was proved; and (2) during its existence, one overt act was done by a conspirator in furtherance of some object or purpose of the conspiracy. (T. 1122) Also included in the instructions was the statement that "[t]he proof need not establish with certainty the exact date . . . on which an alleged offense was committed." The same instruction stated "[i]t is sufficient if the evidence establishes . . . the alleged offense was committed on a date reasonably near the date alleged in the indictment." (T. 1131). The jury returned a general verdict of guilty against both Petitioners on the conspiracy count.

The maximum fine under the statute on which he was convicted (18 U.S.C. § 371) was $10,000.00. In imposing sentence against Petitioner Hartness on Count I, however, the trial court apparently relied on the provision of the Alternative Fine Statute (18 U.S.C. § 3623) in assessing a fine of $50,000.00. Congress expressly declared that the alternative fines provided under § 3623 could be imposed for offenses committed after the effective date of that statute, which was December 31, 1984. The issue of the illegality of fine imposed on Petitioner Hartness in this case was raised on appeal to the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Petition Should Be Granted to Resolve the Split Among the Circuits Regarding the "Materiality" Requirement in Prosecutions Under 18 U.S.C. § 1001.

The Petitioners were charged and convicted under the venerable false statement statute, 18 U.S.C. § 1001. The statute provides, in pertinent part:

> Whoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device *a material fact,* or makes any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five (5) years, or both. (emphasis supplied)

During the trial in the district court, the defense contended, among other things, that the alleged "statements" were not "material" within the meaning of the statute. Over the objections of the defense, however, the district court instructed the jury that the alleged statements were

material as a matter of law. (T. 1131). The issue was preserved and presented to the Eighth Circuit of appeal. In keeping with the holdings of numerous cases in that circuit,[1] the Court of Appeals affirmed the convictions, holding that, while materiality is a required element of the offense, the determination of the issue was a question of law, for the court to decide.

The issue presented here has produced a wealth of discordant views, and the Circuit Courts of Appeal are sharply divided on the issue. *See, Greber* v. *United States*, 474 U.S. 988 (1985) (White, J., dissenting). In keeping with the dictates of the Sixth Amendment requirement of trial by jury and the Fifth Amendment due process requirement of proof beyond a reasonable doubt as to all elements of an offense, two circuits have held that the issue of materiality must be submitted for jury determination.[2] On the other hand, numerous circuits have held that, while proof of materiality is a required element of the offense, the issue is to be determined by the court, rather than the jury.[3] Yet a third view has been taken by at least one circuit court, which has held that proof of materiality is not a required element of the offense of making a false statement in violation of § 1001.[4] In addition, decisions

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[1] *See e.g., United States* v. *Richmond*, 700 F.2d 1183 (8th Cir. 1983); *United States* v. *Adler*, 623 F.2d 1287 (8th Cir. 1980); *United States* v. *Hicks*, 619 F.2d 752 (8th Cir. 1980).

[2] *See, United States* v. *Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States* v. *Irwin*, 654 F.2d 671 (10th Cir. 1981).

[3] *See* cases cited, *supra* note 1. *See also, United States* v. *Corsino*, 812 F.2d 26 (1st Cir. 1987); *United States* v. *Greber*, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States* v. *Hausmann*, 711 F.2d 615 (5th Cir. 1983); *United States* v. *Brantley*, 786 F.2d 1322 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986).

[4] *United States* v. *Elkin*, 731 F.2d 1005 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984).

in two circuits appear to hold that materiality is a required element—but not the kind of required element which requires proof beyond a reasonable doubt.[5]

The wide variation in the treatment given to this issue by the circuits has caused widespread and genuine consternation. There has been no uniform application of the law in prosecutions under this statute. The issue is of grave importance because of the abundant usage of this general statute as a tool for prosecution; even where more specific, and more narrowly-drawn statutes are applicable. Indeed, it is a favorite tool of prosecutors for the very reason that it is so broad in its purported reach and so general in its terms.

This is an area of the law which cries out for clarity and order. The Court should also consider that the resolution of this issue would have the additional beneficial effect of clarifying the law in connection with other criminal stautes. Materiality is an issue pertinent to many federal criminal statutes.

As noted above, there is a split in the circuits even as to the fundamental issue of whether materiality is a required element of the offense of making a false statement in violation of § 1001. This is, of course, the initial inquiry which must be made in determining the constitutional requirements which apply.

Only one of the Circuits has expressly held that materiality is not a required element of an offense under § 1001. *United States* v. *Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984). While Petitioners

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[5] *See, United States* v. *Beer*, 518 F.2d 168 (5th Cir. 1975); *United States* v. *Chandler*, 752 F.2d 1148 (6th Cir. 1985).

disagree with the holdings of the Second Circuit, at least its stance on this issue provides a logical basis for holding that a jury determination is not required. Unfortunately, while this minority position does produce an internal symmetry, it is difficult to maintain in light of well-settled rulings in other areas—and the vast majority of the Courts of Appeals have rejected this position.

Opinions from the Fifth and Sixth Circuits suggest another "approach" to this crucial issue. In a hybrid-like manner, these opinions acknowledge that materiality is "required," and that it is an "element;" but not the kind of "essential element" which requires proof beyond a reasonable doubt. *United States* v. *Beer,* 518 F.2d 168, 172 (5th Cir. 1975); *United States* v. *Chandler,* 752 F.2d 1148, 1151 (6th Cir. 1985). They appear to view it as a matter of "judicial limitation" in the application of § 1001—a type of *de minimus* restriction on prosecutions under the statute.

Most unfortunate, perhaps, is the position taken by numerous Courts of Appeal which have found materiality to be an essential element of the offense—yet have reserved its determination to the court, as a matter of law. It is exceedingly difficult, if not impossible, to square this position with the dictates of the Fifth and Sixth Amendments, and this Court's holding in *In re Winship,* 397 U.S. 358 (1970). Indeed, the opinions of these courts generally do not attempt to square their holdings with those principles. Rather, reliance is usually placed upon this Court's opinion in *Sinclair* v. *United States,* 279 U.S. 263 (1929). No case has been found which attempts to harmonize *Sinclair* with this Court's much more recent precedents concerning due process and trial by jury. Some courts have

obviously struggled with the issue, and have expressed some measure of discomfort over it.[6]

These serious questions should be determined by this Court, so as to eliminate the confusion which obviously exists among the courts on these issues. The chaotic state of the law in this area places this case squarely within the criteria set forth in this Court's Rule 17.1 (a), governing the considerations for review by certiorari. Until these fundamental issues are decided by this Court, the citizens will continue to be denied the uniform application of law to which they are entitled.

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[6] *See, e.g., United States* v. *Hausmann*, 711 F.2d 615, 617 (5th Cir. 1983), where the court stated:

> There is force to Hausmann's argument. Unfortunately it is directed to the wrong forum. *Sinclair* and the Fifth Circuit decisions applying it to section 1001 control this panel. Unless and until the Supreme Court overrules *Sinclair*, we are bound to follow the rule it established. (footnote omitted)

Indeed, a judge of the Eighth Circuit expressed serious reservations in this area. Referring to the government's reliance on *Sinclair*, Judge McMillian wrote:

> The issue [in *Sinclair*] was whether the testimony was "material" to the committee's inquiry. That question was akin to the relevancy of evidence in a legal proceeding, a matter specifically in the competence of a judge. The question of materiality in a fraud-type case like this proceeding is the factual tendency of the alleged fraud to induce action by the government, a question quite different than the relevancy of evidence in a legal proceeding. Therefore we do not find the *Sinclair* case controlling here. (Judges Bright and Ross did not join in these comments).

United States v. *Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980).

II.

The Petition Should Be Granted to Consider the Due Process Implications of Prosecutions Under 18 U.S.C. § 1001 Involving Estimates or Predictions of the Future.

This case involves the submission of loan applications and verification of employment forms to the Farmers Home Administration, an event which occurs literally thousands of times each day, involving thousands of citizens in this country. But, even beyond that scope, millions of citizens are involved in submitting documents to government agencies on a daily basis which require them to estimate, project, or predict future events. Estimates of future earnings for payment of estimated taxes is only one of scores of examples which could be cited. The issue presented herein arises, and will continue to arise, each and every time that the general false statement statute, 18 U.S.C. § 1001, is used as a vehicle to prosecute a case involving estimates, projections, or predictions of future events.

This Court should rule on the very important and fundamental due process issues inherent in the application of generalized "false statement" statutes to such estimates or projections. Citizens who deal with their government on a daily basis, whether they be loan applicants, employers of loan applicants, self-employed taxpayers, or others similarly situated, are entitled to fair notice and objective standards by which to judge and be judged. Continued and unfettered use of these statutes in such cases provides neither. Due process of law requires that fair notice and objective and ascertainable standards be employed before citizens are deprived of their liberty or property.

The Petitioners were charged with making material false statements in an application and a verification of employment form which were submitted to the Farmers Home Administration (FmHA).[7] Petitioners request this court to review the issue of the application of the "false statement" requirement of 18 U.S.C. § 1001 to the "statements" concerning annual income in this case. It is crucial to understand that the "statements" at issue on this point were "estimates" or "projections," rather than statements of historical fact. It is undisputed that the representations made by Petitioners concerning the "annual income" of Michael R. Grubb were predictions of his expected future income, and they were so treated by the Eighth Circuit.[8] *United States* v. *Hartness*, 845 F.2d at 160, 162.

The jury in this case was instructed that the alleged statements must have been "false or fictitious and fraudulent in some material particular." (T. 1129). The jury was also instructed that a statement is "false" or "fictitious" if it was "untrue" when made, and known to be untrue by the person making it. (T. 1130). Proper and

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[7] Both petitioners were charged in Count I with conspiracy to defraud the government by submitting materially false and fraudulent statements to the FmHA, in violation of 18 U.S.C. § 371 and § 1001. Petitioner Keener was charged in Count V with representing that the annual income of Michael R. Grubb was $7,176.00, when she then knew that the annual income was less than that amount. Likewise, Petitioner Hartness was charged in Count VI (along with Petitioner Keener) with representing that Michael R. Grubb was "earning" $10,000.00 per year, when he knew that Michael R. Grubb "earned" $7,370.00.

[8] At one point in discussing this issue, Judge Gibson seems to imply that Keener represented that Grubb was a full-time employee, when she knew that he worked part-time and attended college full time. This implication, if made, is factually incorrect. Keener was specifically charged with misrepresenting Grubb's "annual income," not his employment status. In fact, the original Indictment did allege a false statement concerning Grubb's employment status, but this charge was not included in the Superseding Indictment.

adequate objections to the application of the "false statement" requirement to these alleged "statements" were made at trial, and these issues were properly preserved and presented on appeal to the Eighth Circuit. *See United States* v. *Hartness,* 845 F.2d at 160-161. The jury returned verdicts of guilty for both petitioners on Count I (conspiracy). Verdicts of guilty were also returned against Petitioner Keener on Count V and Petitioner Hartness on Count VI.[3]

The focus of this Petition, therefore, is on the application of the "false statement" requirement of 18 U.S.C. § 1001 to subjective predictions of future earnings. In this specific context, such an application fails to provide fair notice to a citizen of what conduct on his part may give rise to punishment. Further, under the instructions given to the jury in this case, such an application fails to provide an objective and ascertainable standard of guilt to be applied by the jury. Therefore, this particular application of the statute results in a denial of the due process of law required by the Fifth Amendment.

The two branches of this argument will be presented separately, below.

Fair Notice

Michael R. Grubb, an hourly employee in Petitioner Hartness' building supply business, desired to make application to the FmHA for a loan under its rural housing program. Petitioner Keener was a co-employee who assisted Grubb in preparing his FmHA loan application. Petitioner Hartness subsequently completed a verification of employment form in connection with that application.

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[3] Petitioner Keener was also convicted on Count X of the Indictment, which is not relevant to this issue.

As noted, these forms elicit subjective predictions of what the applicant is expected to earn from the prediction date through the following twelve months.

In order to provide such an estimate, an applicant, and his employer, must exercise subjective judgment in making the estimate. Under the government's theory in this case, and under the instructions given to the jury, these projections are subject to prosecution and conviction if "untrue." However, there is no clearly defined standard for an applicant or an employer to use in determining when an estimate will be considered "untrue."

Obviously, predictions of future events cannot be held to the same standard as statements of historical fact. The Eighth Circuit expressly acknowledged this principle by noting that ". . . a statement of future earnings need not be made with the same degree of precision required of a statement of past earnings." *United States* v. *Hartness*, 845 F.2d at 160. The question that necessarily arises is what degree of precision must be achieved to keep one out of harm's way? While it is no doubt possible to make a false or fraudulent prediction of future events, there are also many non-fraudulent, good faith projections which are nonetheless inaccurate. Due process requires that a citizen be fairly apprised of the nature and degree of conduct on his part which will expose him to criminal liability. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972). The application of criteria such as "false," "fictitious," or "untrue" to such estimates simply does not provide an adequate objective standard to differentiate what is acceptable from what is unacceptable. Every person confronted with the task of supplying such information is entitled to fair notice of the precision with which he is required to act. In the absence of that notice, he cannot make an informed decision concerning whether, or how,

he should act—without unwittingly exposing himself to criminal prosecution and punishment.

The dilemma is created by the application of a general, though venerable, false statement statute to a fact situation which requires the exercise of a significant amount of subjective judgment, as opposed to a specific knowledge of historical fact. It is no answer to this dilemma to simply observe, as the panel below has done, that a prediction can be false, and that the jury must have so found. The real issue, for purposes of this Petition, is whether these petitioners had fair notice of just how accurate their estimates were required to be. The panel decision below suggests that a finding of *mens rea* somehow also answers the question of whether the prediction was false. While this suggestion has a certain superficial appeal, it ignores the fundamental concepts of criminal law and due process.

To state that Petitioners' predictions were false, and that they knew them to be false, simply assumes the very fact in issue; i.e., that there was an objectively reasonable standard to make that determination—and that the Petitioners had fair notice of it. Allowing "predictions" to be prosecuted as "false statements," in circumstances such as appear here, delegates to prosecutors and juries the inherently legislative task of determining when an estimate is so morally reprehensible that it should be punished as a crime. It also improperly subjects citizens to the risk of arbitrary or discriminatory prosecution and conviction. *See United States* v. *Kozminski*, 56 U.S.L.W. 4910 (June 29, 1988) (No. 86-2000). Moreover, the type of estimate prohibited, under the Eighth Circuit analysis, would depend entirely on the defendant's state of mind. Under this view, the statute provides virtually no objective indication of the conduct it prohibits; thus failing to provide fair notice to ordinary people who are required to conform their conduct to the law. *Id.* at 4915.

The facts in this case serve to highlight the problem. Petitioner Keener was convicted of predicting an annual income for Michael R. Grubb in the amount of $7,176.00. The evidence showed that Keener not only included the estimate of annual income, but also the method she used to compute the amount; a simplistic, but straight-forward formula of multiplying an average number of hours worked per week by the hourly wage, multiplied by the number of weeks in a year (40 x 3.45 x 52 = 7176). (T. 465). Petitioner has argued in the courts below that she had no notice that this method of projecting income was inadequate or that she was exposing herself to criminal liability by using it. The method was admittedly crude and simplistic, but it was fully disclosed as such. Furthermore, the evidence presented at trial clearly established the essential reasonableness of the prediction. Michael Grubb's actual payroll records were introduced into evidence at trial. They showed that he actually worked an average of over thirty four (34) hours per week for the entire year of 1984; averaging over forty six (46) hours per week during the summer, and nearly thirty (30) hours per week during the school year. (T. 500, Ex. G-5). In addition, his actual hourly wages increased several times during that year, from a starting point of $3.50 per hour up to $4.75 per hour. Michael Grubb testified at trial that he actually earned approximately $7,870.00 in 1984. (T. 491). He also acknowledged that Hartness' estimate of "approximately $10,000" for the twelve months following the August 21, 1984 prediction date "would be pretty close." (T. 502-503).

Where was the notice to these Petitioners that their estimates, the basis for which was plainly disclosed, could subject them to prosecution and conviction of felony offenses for false statements? It did not exist, any more than an objective and ascertainable standard of guilt existed for the jury to apply in deciding their case.

Ascertainable Standard of Guilt

Much of what has been set forth above applies with equal vigor to the issue of the standard to be applied by the jury in this case. Under standard instructions used in connection with prosecutions under § 1001, the jury in this case was simply instructed that the government was required to prove (1) a false writing or document; (2) knowledge that the writing or document was false in some material particular; and (3) willfulness. The jury was instructed that "false" or "fictitious" meant "untrue when made," and known to be untrue by the person making it. Without more, these instructions did not provide the necessary objective and ascertainable standard needed to insure a reasonable uniform application of the criminal statute.

It is at once apparent that the figures listed by Petitioners were "different" from the actual income earned by the applicant. But, were they therefore "false" or "untrue?" The jury certainly heard nothing in the instructions which would have indicated otherwise. The jury did not have the benefit of the Eighth Circuit panel's later observation that " . . . a statement of future earnings need not be made with the same precision required of a statement of past earnings"—or any other qualifying instruction to guide them in their deliberations. Of course, this is precisely the dilemma created by the application of this general statute to this specific kind of fact situation.

As this Court so very recently observed, it is one thing to recognize that some degree of uncertainty exists whenever judges or juries are called upon to apply substantive standards established by Congress. It is quite another thing to tolerate the arbitrariness and unfairness created when judges or juries *develop* the standards for imposing criminal punishment on a case-by-case basis. *United States* v. *Kozminski,* 56 U.S.L.W. at 4915. This Court should

again "adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id. See also, McNally* v. *United States*, 483 U.S. —— (1987). The purposes underlying the rule of lenity—to promote fair notice, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between the Congress, prosecutors, and courts—would certainly be well-served by this Court's review of this important issue.

III.

The Petition Should Be Granted to Consider the *Ex Post Facto* Implications of Enhanced Sentences Without a Jury Determination That the Offense Was Committed After the Effective Date of the Sentencing Statute.

Petitioner Hartness was convicted of conspiracy under Count I of the indictment in violation of Title 18 U.S.C. § 371. The maximum fine under § 371 is $10,000. (*See*, Appendix B, 13a) The United States District Court imposed an alternative fine of $50,000 under 18 U.S.C. § 3623. However, § 3623 is applicable *only* to offenses occurring *after* December 31, 1984 (see note under 18 U.S.C.A. § 1 quoting Pub. L. 98-596 § 10, Oct. 30, 1984, 98 Stat. 3138). There was no factual determination by the jury in this case that any offenses occurred after that date. Therefore, § 3623 was applied retroactively to impose a more onerous penalty. This application violates the ex post facto principle of the due process clause.

Count I of the Superseding Indictment alleged that the conspiracy began on or about January 5, 1983 and continued up to and through the date of the Indictment which was March 17, 1987. It was *alleged* that the conspiracy was formed prior to December 31, 1984, the effective date of

the statute used to determine Petitioner Hartness' fine (18 U.S.C. § 3623). It was also *alleged* that the conspiracy continued through March 17, 1987; its alleged duration thus spanning the effective date of § 3623. Of course, the jury was quite properly instructed that the allegations in the Indictment were not evidence.

At the close of the evidence, the jury was instructed that in order to establish the offense of conspiracy, four essential elements are required to be proved: That the conspiracy was willfully formed, and was existing at or about the time alleged; that the accused willfully became a member of the conspiracy; that one of the conspirators knowingly committed at least one of the overt acts charged in the Indictment, at or about the time and place alleged; and that the overt act was done in furtherance of some object or purpose of the conspiracy (T. 1121). So, the jury could have convicted on a finding that the agreement (conspiracy) occurred on or about the date alleged (January 5, 1983) and that only one (1) overt act occurred in furtherance of the agreement. The Superseding Indictment listed at least thirty-five (35) separate overt acts alleged to have been in furtherance of the conspiracy, which occurred between January 5, 1983 and December 31, 1984, the effective date for application of § 3623.

Nothing in the jury instruction even hinted at the fact that the duration or continued existence of the conspiracy past December 31, 1984 was even an issue. In fact, the trial court specifically instructed that proof of the exact date on which an offense was committed was not needed; that it was sufficient if the alleged offense was committed "reasonably near" the date alleged. (T. 1131) With regard to conspiracy, as noted, they were told that the offense was complete on finding the agreement and only one overt

act in furtherance of it. Of course, at trial, no one—the court, the parties, or the jury—was aware of the fact that the trial court would ultimately seek to impose a fine under § 3623.

Petitioner Hartness was convicted on the conspiracy charge; but the general verdict did not include any factual finding that would have established that the conspiracy extended past December 31, 1984. Nothing about the general verdict returned on this count permits the conclusion that Petitioners' conviction was based on a conspiracy that was in existence after December 31, 1984. As noted, the jury was advised that the offense was complete upon finding of only one (1) overt act—the date of which was not of critical importance.

The specific error was that the district judge utilized an enhanced penalty statute without any factual determination, by the jury, that any offense committed by Hartness occurred after the effective date of the statute. No predicate action was taken to justify the use of § 3623. The district court did not advise the jury regarding the effective date of 18 U.S.C. § 3623. Nor did the court caution the jury of the importance of finding the offense continued after December 31, 1984.

The imposition of a $50,000.00 fine under these circumstances violates the ex post facto principle embodied in the due process clause. "Requiring proof of illegal conduct after the enactment of the statute prevents it from running afoul of the ex post facto clause." *United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied* 435 U.S. 904 (1978). In this case where proof of illegal conduct after the effective date of 18 U.S.C. § 3623 was not established by a factual determination made on that issue by the jury, the district court imposed an illegal fine in

violation of the ex post facto principle of the due process clause of the Fifth Amendment.

Petitioners acknowledge that the existence of the "conspiracy" charge in this case reduces the clarity which would attend this issue if only "substantive counts" were involved. Conspiracy is often characterized as a continuing offense—the duration of which can span months or even years. This perhaps provides some explanation for the failure of the courts below to adequately address this claim.

It is true that the existence of a conspiracy which is determined to have spanned a critical date may save a conviction from challenge. However, it is necessary that the duration of the conspiracy be determined, in order to do so. Simply alleging a duration, without proving it and having it determined by the jury, will not suffice. Nor can the general verdict of guilt on the conspiracy offense here be "translated" into such a finding. Such an effort would directly violate the principle of *Stromberg* v. *California*, 283 U.S. 359 (1931), and the many cases following it; including this Court's very recent pronouncement in *Mills* v. *Maryland*, 56 U.S.L.W. 4503 (June 6, 1988) (No. 87-5367).

An excellent example of the proper handling of this type of situation can be extracted from cases involving conspiracy prosecutions where the statute of limitations was asserted as a bar to conviction. *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1984), is such a case. In a careful and scholarly opinion, Judge Friendly addressed the fundamental issues involved in this petition; i.e., where the government wishes to use the "continuing" nature of a conspiracy charge to cross a specific time line, a carefully defined submission of the issue is required to be given to the jury for its determination. In fact, the issue is even

more prejudicial to the Petitioners here than in a case such as *Borelli.*

In *Borelli,* the statute of limitations issue was raised by the pleadings and pre-trial development of the case. The defense was apprised of the importance of the issue and thus prepared to address the issue, both legally and factually, at the trial. Here, the defense had no advance notice or warning that the issue of the dates or the duration of the alleged conspiracy had any relevance whatsoever. It was only after the trial, in connection with sentencing, that the possibility of the application of the alternative fine statute was raised. At that stage it was too late for anyone; the prosecution, the district court, or the defense, to propose or employ the carefully defined submission to the jury which could have established the facts necessary to resolve the dispute. When the district court proceeded to apply the statute without the necessary predicate finding, it committed error of constitutional magnitude.

Finally, the requested resolution of this issue will produce benefits far beyond the correction of error in this case. A review of numerous cases in the preparation of this Petition reveals a considerable confusion on the part of the courts as to the requirement for specific factual findings and the need for specific, focused instructions which often arise in conspiracy prosecutions. This Court's adoption of the principles laid out in *Borelli* would promote a great deal of order in a troublesome area of the law. It would provide much needed guidance to trial courts, and it would serve to protect citizens from the unfairness inherent in *ex post facto* situations.

CONCLUSION

For all of the reasons set forth in this Petition, Petitioners respectfully pray that the Writ of Certiorari be granted.

Respectfully submitted,

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Certificate of Service

I, William R. Wilson, Jr., hereby certify that, in compliance with Rule 28.4(a) of the Rules of the Supreme Court of the United States, three copies of this Petition for Writ of Certiorari have been deposited within a United States Post Office, with first class postage pre-paid, addressed to:

Charles Fried, Esquire
Solicitor General
Department of Justice
Washington, D.C. 20530

on this 10th day of August, 1988.

/s/ William R. Wilson, Jr.
William R. Wilson, Jr.

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Hartness*, entered April 15, 1988

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-1835

UNITED STATES OF AMERICA,

Appellee,

v.

BILLY H. HARTNESS and BRENDA K. KEENER,

Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas.

Submitted: January 15, 1988

Filed: April 15, 1988

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

On April 1, 1987 Billy Hartness and Brenda Keener were found guilty in the district court[1] of conspiracy to defraud the United States in violation of U.S.C. 18 § 371

[1] The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

(1982).[2] Hartness was also found guilty of one count and Keener of two counts of filing false documents with the government, all in violation of 18 U.S.C. § 1001 (1982).[3] We affirm.

I. Background

At all relevant times Billy Hartness was a building contractor involved in the construction of single family dwellings in Monticello, Arkansas and the surrounding area. Brenda Keener was a certified public accountant employed by Hartness and the operator of Keener Realty, a realty company operating out of the Hartness Building Supply office.

Many of the homes built by Hartness were purchased by individuals receiving assistance from the Farmers

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[2] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] 18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Home Administration Rural Housing Program. Pursuant to this program FmHA provides low interest loans to qualified individuals to enable them to purchase homes.

At issue in this appeal are the actions of Hartness and Keener in connection with a loan application filed by Michael Ray Grubb and his wife Deedra Grubb. Grubb was a part-time bookkeeper for Hartness from January 1983 to February 1985 while attending college full-time. During the summers when school was not in session Grubb worked full-time for Hartness.

Shortly before getting married, Grubb became interested in purchasing a home from Hartness. Grubb's original application for FmHA assistance was filled out by Keener and presented to Grubb for his signature. The application stated that Grubb worked forty hours per week, fifty-two weeks per year, and earned $3.45 per hour for an annual total of $7,176. Grubb's status as a full-time student was not mentioned on the application.

After the loan application was submitted Hartness signed three separate Verification of Employment forms (VOEs). On the first form, dated March 8, 1984, Grubb's base pay to date, past year income, and hours per week were incorrectly reported. The second VOE, dated July 2, 1984, reported an increase in Grubb's hourly wages to $3.90 per hour and continued to report full-time employment status. At about this time Keener told Grubb that his wife should not seek employment until after closing on the house because a large increase in income would result in denial of their application.

On August 21, 1984, the final VOE was signed by Hartness reporting that Grubb was earning $4.25 per hour, forty-three and one-half hours per week, fifty-two weeks

per year. Grubb's past year income was reported to be $8,211 and his expected income for the following year was reported to be approximately $10,000. At trial Grubb testified that on the date of the final VOE he was earning less than $4.25 per hour, was not working full-time year-round, and had not earned $8,211 the previous year. Grubb testified that due to his marriage the figures reported on the second VOE would not have qualified him for a loan, so the figures were increased. Grubb further testified that he and Keener went over all the figures "to make it work." When asked whether he planned to make $10,000 the following year, Grubb responded, "Not unless I got a nice raise."

Appellants were charged in a multi-count indictment with one count of conspiring to defraud the government and numerous counts of submitting false statements to the government. Keener was convicted on the conspiracy count, on Count VI dealing with the Grubb application, and on Count X which is not relevant to this appeal. Hartness was convicted on the conspiracy count as well as on Count V dealing with the Grubb VOE.

II. Discussion

Appellants' first argument is that Counts V and VI of the indictment failed to state an offense and therefore should have been dismissed by the district court.

Count V charged:

> On or about March 7, 1984, in the Eastern District of Arkansas, the defendant, Brenda K. Keener, in a matter within the jurisdiction of the Farmers Home Administration, an agency of the Department of Agri-

> culture of the United States, did willfully and knowingly use and cause to be used a false writing and document containing a materially false, fictitious and fraudulent statement, knowing the same to contain such a statement, in that in an Application for Rural Housing Assistance submitted to the Farmers Home Administration the defendant stated and represented that the annual income of Michael Ray Grubb was $7,176 whereas in truth and in fact, as the defendant then knew, the annual income of Michael Ray Grubb was less than that amount, all in violation of Section 1001 of Title 18 of the United States Code.

Keener argues that Count V fails to state an offense because it is legally impossible to falsify a projection of future events. Annual income is defined as "any income planned to be received in the coming year by the applicant or a member of his household." *Johnson* v. *Department of Agric.*, 734 F.2d 774, 776 (11th Cir. 1984). *See also* 7 C.F.R. §§ 1944.8 (c)(2) and (c)(3) (1984). FmHA employees testified that annual income is an estimate of projected income based upon current income and events expected to occur in the future.

Taken to its logical conclusion, Keener's argument would allow her to falsify with impunity the statement of annual income on every loan application she assists in filling out. Since it was merely a guess, could Keener have legally estimated Grubb's income to be $1 million. We think not.

Granted, a statement of future earnings need not be made with the same degree of precision required of a statement of past earnings. No one can be prosecuted for failing to accurately predict the future. At the same time,

however, one who cavalierly adjusts her prediction to suit her needs can not seek shelter behind the definition of income and argue that an estimate can not be false. Based on the facts in existence on the date of the application, Keener's statement of Grubb's projected annual income was false and was known by Keener to be false. The projection was based on full-time employment when Keener, Grubb's immediate supervisor, knew that Grubb worked only part-time and attended college full-time. In support of her argument Keener cites *United States* v. *Vesaas,* 586 F.2d 101 (8th Cir. 1978), in which a conviction under 18 U.S.C. § 1001 was reversed because the allegedly false statement was literally and factually correct. Since it is legally impossible to hold stock in joint tenancy with a decedent, a statement denying such ownership can not be the subject of prosecution under § 1001, the court held. We fail to see the relevance of *Vesaas* to the present case. It is not legally impossible to falsify annual income even though it is a projection because criteria are provided from which to make the projection. *See* 7 C.F.R. § 1944.8 (c). Putting false information into the equation necessarily leads to a false projection. Consistent with Keener's argument, if we take into account the definition of income, Count V of the indictment charged that Keener "stated and represented that the [projected] annual income of Michael Ray Grubb was $7,176 whereas in truth and in fact, as the defendant then knew, the [projected] annual income of Michael Ray Grubb was less than that amount." We believe this language states an offense.

Count VI, which is challenged by Hartness, charged:

> On or about August 21, 1984, in the Eastern District of Arkansas, the defendants, Billy Horace Hartness

> and Brenda K. Keener, in a matter within the jurisdiction of the Farmers Home Administration, an agency of the Department of Agriculture of the United States, did willfully and knowingly use and cause to be used a false writing and document containing a materially false, fictitious and fraudulent statement, knowing the same to contain such a statement, in that in a Verification of Employment submitted to the Farmers Home Administration the defendants stated and represented that Michael R. Grubb was employed by Billy Hartness Building Supply earning $10,000 per year whereas in truth and in fact, as the defendants then knew, Michael R. Grubb earned $7,370, all in violation of Sections 1001 and 2 of Title 18 of the United States Code.

Hartness argues that Count VI fails to state an offense because it was premised on a false estimate of future earnings. For the reasons previously discussed, we believe that Count VI states an offense.

Appellants next argue that the district court erred in denying their motions for judgment of acquittal based on insufficiency of the evidence. When reviewing the sufficiency of the evidence we must give the government the benefit of all reasonable inferences that may be drawn from the evidence. Viewing the evidence in a light most favorable to the government, we will reverse the convictions only if the verdicts are not supported by substantial evidence. *United States* v. *Casperson*, 773 F.2d 216, 221 (8th Cir. 1985).

Keener challenges her conviction on Count V on two grounds. First, she argues that the evidence at trial showed that Grubb actually earned in excess of $7,176 in

the twelve months following the loan application. Therefore, because her statement of Grubb's income was correct, she should have been acquitted. We disagree. The correct test is whether the statement of income was false when made. Subsequent events are relevant only to the extent that they were foreseeable on the day the loan application was completed. After carefully reviewing the record we believe that sufficient evidence was given to the jury to support the verdict. One need only review Grubb's testimony to find sufficient evidence that Keener knowingly falsified Grubb's income.

Second, Keener argues that the statement of annual income was not material because FmHA personnel testified that they do not rely on the statement when determining loan eligibility. They rely on the statement of income appearing on the VOE, Keener argues. Actual reliance is not an element of materiality, however. The test is whether the statement was capable of or had a natural tendency to influence the FmHA. *See Blake* v. *United States*, 323 F.2d 245, 246-47 (8th Cir. 1963). Certainly a statement of income on a loan application is capable of influencing the officials empowered to approve or disapprove the loan.[4]

Hartness challenges his conviction on similar grounds. First, he argues that applying the definition of annual income found in the FmHA regulations, Grubb's annual

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[4] Appellants further argue that the district court erred in failing to submit to the jury the issue whether the false statements made by appellants were material. Appellants concede that in most cases materiality is a question of law for the trial judge to decide but argue that in some cases, such as this, the issue is better left to the jury. We are not persuaded that we should deviate from the general rule in this circuit that materiality is a question of law. *See United States* v. *Brown*, 763 F.2d 984, 993 (8th Cir.), *cert. denied*, 474 U.S. 905 (1985).

income was in excess of $12,000. Annual income is defined as currently monthly income times twelve. 7 C.F.R. § 1944.2 (c). In the thirty days preceding August 21, 1984, the date of the third VOE, Grubb earned $1049.46, due in large part to fifty-eight hours overtime worth $369.46. We are not persuaded by Hartness' overly technical argument. Common sense dictates that an abberational month should not be used to determine annual income. Hartness could not possibly have believed that Grubb would work fifty-eight hours of overtime each month over the course of the upcoming year while also attending college full-time.

Further, Hartness fails to take into account the specific regulations dealing with overtime. Title 7 C.F.R. §§ 1944.8 (c)(2) and (c)(3) provide that annual income consists of current monthly income times twelve plus the estimated amount of overtime for the ensuing twelve months. Hartness' method of computing annual income completely distorts these regulations. It was abundantly clear at the time the VOE was completed that the preceding thirty day period was not indicative of the ensuing twelve months. We are not dealing with a projection which, because of unforeseen events, ultimately turned out to be inaccurate. To the contrary, this case involves a conscious decision by Hartness to knowingly overestimate Grubb's annual income so that Grubb could qualify for a loan. The fact that Hartness prefaced $10,000 with the word "approximately" does not alter our opinion on the matter.[5]

We find no merit in appellants' next argument that due process was violated when the jury was provided with the

[5] We need not consider appellants' argument that their conspiracy convictions must be vacated because their argument was premised on our reversing the substantive convictions.

indictment during its deliberations. The jury was properly admonished not to consider the indictment as evidence. The district court did not abuse its discretion. *See United States* v. *Wagoner,* 713 F.2d 1371, 1377-78 (8th Cir. 1983).

Next, appellants argue that the indictment for violating 18 U.S.C. § 1001 should have been dismissed because § 1001 is pre-empted by 18 U.S.C. § 1014 which deals specifically with FmHA loan applications. In support, appellants cite *United States* v. *Rose,* 570 F.2d 1358, 1363 (9th Cir. 1978), and argue that the court therein interpreted 18 U.S.C. § 1001 to only reach false statements not specifically covered by other statutes. We read *Rose* differently, however. The appellant in *Rose* argued that he could not be convicted of violating both 18 U.S.C. § 1001 and 18 U.S.C. § 542 (importing merchandise into the United States by means of false statements). The court agreed, holding that because the convictions were redundant—there had been only one illegal act—appellant could not be convicted for violating both statutes.

Rose does not stand for the proposition that § 1001 is pre-empted by other, more specific false statement statutes. It merely affirms the fundamental rule of criminal law that whether a single act can result in prosecution under two or more statutes depends on whether each statute requires proof of an element which the others do not. Because Hartness and Keener were only convicted of violating § 1001, *Rose* is inapplicable.

The rule in this circuit is clear that "prosecution under section 1001 is permissible even in view of other overlapping and more specific false statements statutes." *United States* v. *Gordon,* 548 F.2d 743, 744 (8th Cir. 1977). "[W]hen an act violates more than one criminal statute,

the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U.S. 114, 123-24 (1979). The government had the discretion to prosecute Hartness and Keener under either 18 U.S.C. § 1001 or 18 U.S.C. § 1014 and we will not disturb that choice.

Finally, Hartness argues that the district court erroneously fined him $50,000 on the conspiracy count because 18 U.S.C. § 371 sets forth a maximum fine of $10,000. The district court based the fine on 18 U.S.C. § 3623 (Supp. III 1985) which allows fines of up to $250,000 for offenses occurring after December 31, 1984. Hartness argues that § 3623 is inapplicable because the conspiracy did not occur after December 31, 1984. We disagree. Hartness was charged and convicted of a conspiracy beginning on or about January 5, 1983 and continuing through December 9, 1986, the date of the indictment. Thirty overt acts performed after December 31, 1984 were charged and submitted to the jury. Consequently, the district court was within its discretion when fining Hartness $50,000.

III. Conclusion

For the above reasons appellants' convictions are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Constitutional and Statutory Provisions Involved

* * * * *

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * *

18 U.S.C. § 1001

Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

ingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* * * * *

18 U.S.C. § 3623

Alternative fines

(a) An individual convicted of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (c) of this section;

(3) in the case of a felony, $250,000;

(4) in the case of a misdemeanor resulting in death, $250,000; or

(5) in the case of a misdemeanor punishable by imprisonment for more than six months, $100,000.

(b) A person (other than an individual) convicted of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (c) of this section;

(3) in the case of a felony, $500,000;

(4) in the case of a misdemeanor resulting in death, $500,000; or

(5) in the case of a misdemeanor punishable by imprisonment for more than six months, $100,000.

(c)(1) If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(2) Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise

from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(Added Pub.L. 98-596, § 6(a), Oct. 30, 1984, 98 Stat. 3137.)

APPENDIX C

Relevant Jury Instructions

[Tr. 1120]

INSTRUCTION No. 10-A

It is alleged in the indictment that Billy Horace Hartness and Brenda K. Keener, from on or about January 5, 1983 until December 9, 1986, did combine, conspire, and confederate together and with a number of other individuals named in the indictment to defraud the United States of America and to submit materially false and fraudulent statements to the Farmers Home Administration, an agency of the United States, in violation of 18 U.S.C., Section 371 and Section 1001. The indictment lists a number of overt acts committed in furtherance of the conspiracy by the defendants and the co-conspirators which I will not take time to read individually. These overt acts include the preparation of rural housing loan applications by the defendant Brenda K. Keener, meetings between the co-conspirators, the signing of false documents by Billy Horace Hartness, the signing of false documents by Brenda K. Keener, and the instruction by the defendants Hartness and Keener to the co-conspirators as to what they should say to the federal agents and officials of the Farmers Home Administration.

It is also alleged in the indictment that defendant Hartness and defendant Keener used or caused to be used false writings and documents containing false and fraudulent material statements for submission to the Farmers Home Administration in violation of 18 U.S.C., Section 1001. [Tr. 1121] Defendant Hartness is charged with three counts of violating Section 1001 and defendant Keener with nine counts.

Appendix C—Relevant Jury Instructions

INSTRUCTION No. 11

Section 371 of Title 18 of U.S.C.A. provides in part that:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

INSTRUCTION No. 12

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in the indictment.

First: That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged.

Second: That the accused willfully became a member of the conspiracy.

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

[Tr. 1122] If the jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found

beyond a reasonable doubt by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

INSTRUCTION NO. 13

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to disobey, or to disregard the law.

Mere similarity of conduct among various persons, [Tr. 1123] and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual

understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor were actually used or put into operation; nor that all of the persons charged to have been members of the alleged conspiracy were such. What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon [Tr. 1124] to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

INSTRUCTION No. 14

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

Appendix C—Relevant Jury Instructions

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose [Tr. 1125] either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant—a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

INSTRUCTION No. 15

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the [Tr. 1126] statements and acts may have occurred in the absence and without the knowledge of the

defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statements made, or see the act done.

Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or made before its existence, or after its termination, may be considered as evidence only against the person making them.

INSTRUCTION No. 16

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was willfully formed, and that the defendant willfully became a member of the conspiracy, either at its inception or afterwards, and that thereafter one or more of [Tr. 1127] the conspirators knowingly committed one or more of the overt acts in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose and, in fact, may have failed of so doing.

The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy.

An "overt" act is an act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

INSTRUCTION No. 17

The crimes charged in this case are serious crimes which requires proof of specific intent before the defendants can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To [Tr. 1128] establish specific intent, the government must prove that the defendants knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or a failure to act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one will be convicted of an act done because of mistake, or accident or other innocent reason.

As stated before, with respect to an offense such as charged in this case, specific intent must be proved beyond reasonable doubt before there can be a conviction.

INSTRUCTION No. 18

An act is done "willfully" if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

INSTRUCTION No. 19

It is charged in Count II through Count XI of the indictment that on or about a certain date in the Eastern District of Arkansas, in a matter within the jurisdiction of the Farmers Home Administration, an agency of the Department of Agriculture of the United States, one, or both, of the [Tr. 1129] defendants did knowingly and willfully use and cause to be used a false writing and document containing a materially false, fictitious and fraudulent statement, knowing the same to contain such a statement, all in violation of Section 1001 of Title 18 of the United States Code.

INSTRUCTION No. 20

Section 1001 of Title 18 of U.S.C.A. provides in part that:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . (makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry) shall be guilty of an offense against the laws of the United States.

Appendix C—Relevant Jury Instructions

INSTRUCTION No. 21

Three essential elements are required to be proved in order to establish the offense charged in Counts II through XI of the indictment:

First: That the defendant made and used, or caused to be made and used, a false writing or document in relation to a matter within the jurisdiction of a department or agency of the United States, as charged.

Second: That he or she did such act or acts with knowledge that the writing or document was false or fictitious and fraudulent in some material particular, as [Tr. 1130] alleged; and

Third: That he did such act or acts knowingly and willfully.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

INSTRUCTION No. 22

A statement is "false" or "fictitious," if untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is "fraudulent," if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

INSTRUCTION No. 23

The word "false" must be considered together with the words "knowingly" and "willfully." An act is done "know-

ingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The word "knowingly" is added in order to insure that no one would be convicted who made (or caused to [Tr. 1131] be made) a statement or representation which was false because of mistake or accident or other innocent reason.

If you find that the accused did not knowingly and willfully make any false statements or cause any to be made, you should acquit the accused.

INSTRUCTION No. 24

The proof need not establish with certainty the exact date on which a false document was made or used, or caused to be made or used, or on which an alleged offense was committed. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the allegedly false document was knowingly and willfully made or used, or caused to be made or used, or the alleged offense was committed on a date reasonably near the date alleged in the indictment.

INSTRUCTION No. 25

The making of a false statement to an agency of the United States government is not an offense unless the statement made is a material statement. The issue of materiality, however, is not submitted to you for your decision but rather it is a matter for the decision of the Court. You are instructed that the statements charged in the indictment are material statements.

Appendix C—Relevant Jury Instructions

INSTRUCTION No. 26

The Farmers Home Administration of the Department [Tr. 1132] of Agriculture is an agency of the United States, and documents and statements submitted to it in connection with the rural housing program are matters within the jurisdiction of an agency of the United States.

An application for a rural housing loan, a verification of employment, a verification of child support, and an interest credit agreement are all "writings" or "documents" within the meaning of the statute.

INSTRUCTION No. 28

The defendants have pleaded "Not Guilty" to the charges contained in the indictment. This plea puts in issue each of the essential elements of the offense as described in these instructions, and imposes the burden of establishing each of these elements by proof beyond a reasonable doubt.

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH E. SPANIOL, JR.

No. 88-252

In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY H. HARTNESS AND BRENDA K. KEENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the materiality of false statements under 18 U.S.C. 1001 is a question to be decided by the court rather than by the jury.

2. Whether application of the false statement proscription of 18 U.S.C. 1001 to petitioners' intentional misrepresentation of expected earnings violated petitioners' due process rights.

3. Whether an enhanced penalty statute was properly applied to petitioners' criminal conspiracy, where the conspiracy commenced before the effective date of the statute but extended for more than a year after the effective date.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 845 F.2d 158.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988. A petition for rehearing was denied on June 13, 1988. The petition for a writ of certiorari was filed on August 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners were con-

victed of conspiracy to defraud the United States through the submission of false statements to the Farmers Home Administration (Count 1), in violation of 18 U.S.C. 371. In addition, petitioner Hartness was convicted on one count (Count 6), and petitioner Keener on two counts (Counts 5 and 10), of making false statements to the government, in violation of 18 U.S.C. 1001. Hartness was sentenced to two years' imprisonment and fined $50,000 on Count 1; he was placed on probation for three years on Count 6. Keener was sentenced to two years' imprisonment and fined $5,000 on Count 1; she was placed on probation for three years on the other counts. Pet. 3. The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence, which is summarized in the opinion of the court of appeals, showed that Hartness was engaged in the business of constructing single family homes in the vicinity of Monticello, Arkansas. Keener, who is a certified public accountant, was employed by Hartness. She also operated a realty company out of an office furnished by Hartness.

Most of the houses sold by Keener were built by Hartness and financed by the Farmers Home Administration (FmHA) under its Rural Housing Program, which provided low interest loans to qualified home buyers. Applicants for loans were required to submit sundry financial information, including information about employment and income. The evidence showed that, between March 1983 and October 1986, petitioners assisted more than 15 individuals in the falsification of information in various documents connected with their loan applications to the FmHA.

In particular, petitioners assisted in falsifying documents related to the house purchased by Michael and Deedra Grubb. From January 1983 to February 1985, Michael Grubb was employed by Hartness as a part-time

bookkeeper while Grubb attended college. Keener was his immediate supervisor. Shortly before his marriage, Grubb was told by Keener that she could arrange for him to acquire a house in a new subdivision that Hartness was constructing. Keener prepared an FmHA application for Grubb. The application stated that Grubb worked 40 hours per week, 52 weeks per year, and earned $3.45 per hour, for an annual total of $7,176. The figures were high enough to qualify Grubb for a Rural Housing Program loan. The application, which became the subject of Count 5 of the indictment, did not mention that Grubb was at the time a full-time student.

Among the documents that the FmHA required were Verification of Employment forms. Grubb and Keener filled out three such forms, and Hartness signed all three. On the first form, dated March 8, 1984, Grubb incorrectly reported his base pay, his past year's income, and the number of hours he worked per week. On the second form, dated July 2, 1984, Grubb reported an increase in hourly wages to $3.90 and continued to represent himself as a full-time employee. Keener told Grubb that, to avoid showing a large increase in income, his wife should not seek employment until after the closing on the house had been completed.

Because of his marriage, Grubb's earnings as set forth on the second form were insufficient to entitle him to a federal loan. Accordingly, on August 21, 1984, a third Verification of Employment form, containing different figures, was filled out. This time the form indicated that Grubb worked full time all year; that he earned $4.25 per hour; that his past year's income was $8,211; and that his expected income for the following year would be approximately $10,000. In fact, Grubb was earning less than $4.25 per hour on August 21; his previous year's income was less than $8,211; and he was not projected to earn $10,000 as a

full-time employee because he did not work full time. The third Verification of Employment form signed by Hartness was the basis for his conviction on Count 6.

2. At trial petitioners argued that the materiality of their allegedly false statements should be determined by the jury. The trial judge rejected that contention and determined that the statements in question were material as a matter of law. The court instructed the jury that materiality was an element of the offense, that the question of materiality was not for the jury to decide, and that the statements charged in the indictment were material.

3. On appeal, petitioners argued that Counts 5 and 6, which charged that petitioners misrepresented Grubb's annual income, failed to state an offense because "it is legally impossible to falsify a projection of future events" (Pet. App. 5a). The court of appeals rejected that contention, concluding that, although projections may be less precise than other statements, a deliberate misrepresentation of the annual income that is actually expected based on known facts is a false statement (*id.* at 4a-7a). Because petitioners' statements of projected income were just such misrepresentations, they were false (*id.* at 7a-9a). The court further ruled that the issue of the materiality of the false statements was correctly decided by the district court rather than by the jury (*id.* at 8a n.4) and that the statements of annual income were material because they were "capable of or had a natural tendency to influence the FmHA" (*id.* at 8a). In addition to rejecting various other challenges, the court also held that petitioner Hartness was lawfully subject to a $50,000 fine under 18 U.S.C. (Supp. IV) 3623, which allows fines up to $250,000 for offenses that occur after December 31, 1984. The court observed that Hartness was convicted of a conspiracy that began in 1983 and continued through December 9, 1986, and that

30 overt acts committed in 1985 were proved and submitted to the jury. Pet. App. 11a.

ARGUMENT

1. Petitioners first contend (Pet. 7-11) that the question of materiality under 18 U.S.C. 1001 is a factual question for the jury, not a legal question for the court. The court of appeals correctly rejected that contention.

The great majority of the courts of appeals have held that materiality under Section 1001 is a question of law for the court rather than one of fact for the jury, and this Court has repeatedly declined to review those decisions. See, *e.g.*, *United States* v. *Holley*, 826 F.2d 331, 335 (5th Cir. 1987), cert. denied, No. 87-982 (Mar. 21, 1988); *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986); *United States* v. *Greenwood*, 796 F.2d 49, 55 (4th Cir. 1986); *United States* v. *Brantley*, 786 F.2d 1322, 1327 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Greber*, 760 F.2d 68, 72-73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir.), cert. denied, 474 U.S. 818 (1985); *United States* v. *Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967).[1]

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[1] Near the end of the last Term the Court denied a petition for a writ of certiorari raising this precise issue. *United States* v. *Gibson*,

This array of authority treating materiality as an issue of law accords with this Court's recognition in *Sinclair* v. *United States,* 279 U.S. 263, 298 (1929), that the materiality of false statements generally is a question for the court. That understanding was recently reaffirmed in *Kungys* v. *United States,* No. 86-228 (May 2, 1988). The Court there held that materiality under 8 U.S.C. 1451 is a legal question. In so holding, the Court quoted with approval the Sixth Circuit's *Abadi* decision holding materiality to be a legal question under 18 U.S.C. 1001.

As petitioners point out (Pet. 8), the Ninth and Tenth Circuits have taken a different position on materiality under 18 U.S.C. 1001. See *United States* v. *Irwin,* 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez,* 594 F.2d 725, 729 (9th Cir. 1979).[2] Those decisions, however, do not create a conflict warranting this Court's review. First, neither circuit has addressed the question since this Court's decision in *Kungys,* and both courts have declined to extend the rulings on Section 1001 to other statutes involving the issue of materiality.[3] Both circuits can be expected to re-

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838 F.2d 463 (3d Cir. 1987), cert. denied, No. 87-6426 (May 16, 1988). The Court denied another petition raising the issue on October 3, 1988. *Greenberg* v. *United States,* No. 87-1886.

[2] As petitioners state (Pet. 8), the Second Circuit has concluded that materiality is not an element of a false-statements offense under 18 U.S.C. 1001. *United States* v. *Elkin,* 731 F.2d 1005, cert. denied, 469 U.S. 822 (1984). Of course, that position would be more adverse to petitioners than the Eighth Circuit's view in this case; and if the Second Circuit's view is correct, any variation among the circuits on the materiality issue is entirely academic.

[3] Thus, in several recent decisions applying statutes other than 18 U.S.C. 1001, the Ninth Circuit has held that materiality is an issue of law to be decided by the court. See *United States* v. *Martinez,* 837 F.2d 900, 902 (1988); *United States* v. *Larm,* 824 F.2d 780, 783-784 (1987), cert. denied, No. 87-907 (Feb. 22, 1988); *United States* v.

consider the matter in light of *Kungys*. Moreover, to our knowledge, neither circuit has actually overturned a conviction under Section 1001 on the ground that the issue was not submitted to the jury. The Ninth Circuit has twice held that a trial court erred in not submitting the issue to the jury, but in both cases the court affirmed the convictions because it was clear that the statements at issue were material. *United States* v. *Valdez*, 594 F.2d at 728-729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has approved the practice of submitting the issue of materiality to the jury, but it has not considered whether it is reversible error for a trial court to decide the issue itself. See *United States* v. *Irwin*, 654 F.2d at 677 n.8 and cases cited therein.

In any event, the statements involved in this case were material beyond any doubt. The highly desirable low interest loans available through the FmHA Rural Housing Program were obtainable only by individuals who had sufficient income and whose stable employment history provided some reasonable assurance that the loans would be repaid. See Tr. 39-49. It was precisely in order to meet the program's requirements that petitioners falsified the loan documents submitted to the FmHA. As the court of appeals concluded (Pet. App. 8a (footnote omitted)), "[c]ertainly a statement of income on a loan application is capable of influencing the officials empowered to approve

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Flake, 746 F.2d 535, 537 (1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Prantil*, 764 F.2d 548, 557 (1985). And the Tenth Circuit has recently held that materiality in a perjury case is a question for the court. *United States* v. *Larranaga*, 787 F.2d 489, 494 & n.1 (1986). The court there acknowledged that materiality is properly treated as an issue of law under 26 U.S.C. 7206(1), which covers the filing of false tax returns, and stated: "[w]e need not determine today whether we should continue to treat § 1001 in [a contrary] fashion" (787 F.2d at 494 n.1).

or disapprove the loan." Petitioners' misstatements were therefore material. *United States* v. *Irwin*, 654 F.2d at 677; *United States* v. *Valdez*, 594 F.2d at 728.

2. Counts 5 and 6 of the indictment charged that petitioners knowingly made false representations of Grubb's annual income, in violation of Section 1001. Petitioners contend (Pet. 12-19) that their convictions on those charges violated their due process rights to fair notice and an ascertainable standard of guilt because the false statements were merely subjective predictions of future earnings. The court of appeals correctly rejected petitioners' argument (Pet. App. 4a-7a).

Petitioners were not charged with or convicted of making good faith predictions of earnings that subsequently failed to materialize. Rather, the evidence showed that petitioners knowingly made statements of income that had no foundation in the facts as they knew them at the time. The projections at issue were based on a simple formula requiring that the number of hours worked per week be multiplied by the number of weeks worked per year and by the hourly wage. Petitioners were charged with and convicted of knowingly misstating the components of the formula. Certainly for persons in the real-estate business, like petitioners, there was no lack of fair notice in being charged with knowingly falsifying the projection of annual income, and there was a clear, ascertainable, objective standard of guilt: whether petitioners knowingly misrepresented the facts as they knew them at the time of their projections.

3. Petitioner Hartness challenges (Pet. 19-23) the district court's imposition, as part of the sentence for the conspiracy conviction, of a $50,000 fine under 18 U.S.C. (Supp. IV) 3623, arguing that the fine was unconstitutionally retroactive because the conspiracy did not take place after the effective date of Section 3623 (December

31, 1984). That question is of no continuing importance, because Section 3623 has been repealed. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. In any event, there is no circuit-court conflict on the question, and the court of appeals correctly rejected petitioner Hartness's contention (Pet. App. 11a).

The conspiracy count charged that the unlawful agreement commenced on or about January 5, 1983, and continued through December 9, 1986, the date of the indictment. The charge set forth 65 overt acts, and the evidence showed that 30 of them were committed after December 31, 1984. Because the conspiracy continued past the effective date of Section 3623, the crime was within the coverage of the provision. See *United States* v. *Giry,* 818 F.2d 120, 134-135 (1st Cir. 1987), cert. denied, No. 87-235 (Oct. 5, 1987); *United States* v. *Gibbs,* 813 F.2d 596, 601-602 (3d Cir. 1987), cert. denied, No. 86-1890 (Oct. 5, 1987); *United States* v. *Baresh,* 790 F.2d 392, 404 (5th Cir. 1986); *Huff* v. *United States,* 192 F.2d 911, 914-915 (5th Cir. 1951), cert. denied, 342 U.S. 946 (1952). Also, contrary Hartness's present suggestion (Pet. 20-21)—a suggestion that he did not make in his briefs in the court of appeals—no special jury finding was needed on the timing of the conspiracy. The jury verdict "represents a finding that the conspiracy was committed as alleged, and that [Hartness] participated throughout the conspiracy." *Leyvas* v. *United States,* 371 F.2d 714, 717 (9th Cir. 1967).[4]

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[4] In *United States* v. *Borelli,* 336 F.2d 376, 384-387 (2d Cir. 1964), on which petitioner relies (Pet. 22-23), the indictment charged a single conspiracy involving numerous defendants and numerous overt acts. Because the evidence was ambiguous on whether there was only one conspiracy involving all of the defendants or whether there were instead several conspiracies, each involving different defendants and some ending years prior to the applicable limitations period, the court required specific instructions on the scope of particular defendants'

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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agreements to join in criminal activity. The court noted (336 F.2d at 385): "By no means every conspiracy trial will raise the problem here considered." In the present case, there was clearly only one conspiracy, which involved both petitioners throughout, and there were numerous overt acts in furtherance of the conspiracy within the period covered by Section 3623.

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